PRELIMINARY REPORT OF THE MISSOURI EMINENT DOMAIN TASK FORCE

Presented to
Governor Matt Blunt

State of Missouri
Jefferson City
September 30, 2005

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MEMORANDUM

TO: Governor Matt Blunt

RE: Preliminary Report of the Missouri Eminent Domain Task Force

By Executive Order 05-15, you established the Missouri Eminent Domain Task Force to study the use of eminent domain in Missouri. You directed the Task Force to provide its initial recommendations by October 1, 2005. The Task Force is pleased to offer this preliminary report for your consideration.

I would like to commend my fellow members of the Task Force for their time and dedication to this important work. As you will see in this report, the Task Force has met five times and considered a wide range of issues relating to eminent domain. It is a complicated issue that deserves thorough consideration in a public forum. The Task Force members represent a wide range of interests and their hard work has resulted in much progress toward the objectives set out in Executive Order 05-15. However, much work remains to be completed, and the Task Force will continue to meet to study and discuss the issues.

A final report will be developed by the Task Force and delivered to you by December 31, 2005. That report will contain the Task Force's final recommendations. On behalf of the Task Force, we appreciate your consideration of this preliminary report and look forward to a continuing discussion on this important subject.

Sincerely,

Terry M. Jarrett
Chair

MISSOURI EMINENT DOMAIN TASK FORCE
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Senator Chuck Gross
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BACKGROUND

In June of this year, the United States Supreme Court issued an opinion in a case called Kelo v. New London. That decision has touched off a firestorm across the country, and is the main reason that we are here today. In that case, the Supreme Court ruled that property could be taken from one private owner and transferred to another private owner for economic development purposes without a finding of blight. In other words, the Court ruled for the first time that condemnation of private property solely for economic development was constitutional.

In the wake of this decision, property battles all over the United States have received renewed interest. Eminent domain law and legal procedures vary, sometimes significantly, between jurisdictions. Lawmakers in 28 states have introduced more than 70 bills to restrict the use of eminent domain. Some legislators have introduced constitutional amendments in their states to prohibit the use of eminent domain for private projects or to tighten eminent domain procedures. For example, Alabama Governor Bob Riley signed a law that prohibits the state, cities and counties from taking private property for retail, office, commercial, industrial or residential development.

Even the Federal government is involved. Earlier this summer, Congress passed an energy bill that grants eminent domain authority to the federal government for acquiring rights of way for power lines in high priority transmission corridors.

Everyone who owns a home or a business has the potential to be affected by the Supreme Court's ruling. The Governor expressed concern that this ruling could undermine the balance that ought to exist between private property owners, the needs of the public, and the need for commercial and economic development in our state.

In his Executive Order, the Governor charged the Task Force with the following responsibilities:

- To study the use of eminent domain, especially when the proposed public use of the property being acquired by eminent domain is not directly owned or primarily used by the general public.
- To analyze current state and federal laws governing eminent domain and recommending any changes that would enhance the effectiveness of these laws.
- To develop a definition of "public use" that allows state and local governments to use eminent domain when there is a clear and direct public purpose while at the same time ensuring that individual property rights are preserved.
- To develop criteria to be applied by state and local governments when the use of eminent domain is being proposed; and
- To recommend specific eminent domain legislation for possible consideration by the Missouri General Assembly.

Most would agree that eminent domain, when properly used, serves an important public function. In the days since Governor Blunt established this Task Force, we have heard first hand just how important an issue eminent domain is to so many people. Some believe that it is a legitimate use of eminent domain for the benefit of developers or commercial interests on the basis that anything which increases the value of the property or increases tax revenues is a sufficient public use. Still others are adamant that eminent domain should be abolished entirely or strictly limited to situations where there is a clear and direct public use. In public testimony before the Task Force, many people related their concerns that the process and procedures used in eminent domain proceedings are not fair. They spoke of a process that is long and difficult for the average person to understand. They testified that if an entity with the power of eminent domain cannot purchase a piece of property on the open market, it is unlikely that the landowners will be truly offered the real value of their property. Those who finally receive fair value for their property have exhausted so much in legal and other expenses that the effort was hardly worth it.

WORK COMPLETED TO DATE

The first meeting of the Task Force was held on August 4, 2005. Mr. Stan Wallach of the Wallach Law Firm, St. Louis, gave an overview of Eminent Domain. Mr. Wallach also serves as Chairman of the Eminent Domain Law Committee, Missouri Bar.

Highlights of his review included:

- Neither the Missouri Bar nor the Missouri Bar Eminent Domain Task Force has a public position on the matter.
- E.D. history
  - Eminent domain is a strange term. Latin words meaning Dominium Eminence or supreme lordship. Sometimes referred to as condemnation.
  - Eminent domain power is described in the Bill of Rights, but not specifically addressed in the U.S. Constitution. The Fifth Amendment prohibits the government from doing things to individual liberties. The final clause is the "taking clause" or the taking without just compensation.
- When Missouri was formed it also needed a Constitution and Bill of Rights. Article 1 of the Bill of Rights provides protection from the use of eminent domain, contains the due process clause and just compensation language. Several sections of Article 1 deal with eminent domain, but Section 28 is of particular interest because it deals with no taking of property for private use. Article 6 discusses condemning of property (blight issue). Section 353.020 defines blighted area and Chapter 523 defines the condemnation process. The three steps of the condemnation process include (1) hearing by trial judge; (2) panel of 3 commissioners who will view property and make proposal or assessment; and (3) is the jury trial.
- Mo. Supreme Court Cases, which may serve as precedent, include U.S. Steel (811 S.W. 2d 385); Dalton Case (270 S.W.2d 44 - 1954) and Hon (972 S.W.2d 407 – 1998).
- Public Use evolved to Public Purpose in 1900's. Berman v. Parker is blight case in Washington, DC, which went to the US Supreme Court. 1980's was Midciff decision out of Hawaii. Both cases were relevant to Kelo case. Pulltown, Michigan is case of pure economic development purpose (later reversed in 2004).
- Kelo vs. New London case went to the US Supreme Court in February 2004 and the decision was sent down in June 2005. The Court, in a 5-4 decision, largely deferred to the City of New London's judgment that the proposed development on the seized land would provide appreciable benefits to the community and thus "serve a public purpose...and ...satisfy(s) the public use requirements of the Fifth Amendment." The impact of Kelo on Missouri is what this task force will decide.
- Courts will decide that the decision is a Legislative and political determination.

- Mr. Wallach ended his presentation by offering his services to the task force.

During questioning, Mr. Wallach suggested that possible topics for the working group to look at include:

- Definition of blight
- Possible changes to the Missouri Constitution
- Judicial deference to legislative changes
- Just Compensation
- Procedures

After discussion, the Task Force decided to divide into subgroups. Subgroups include (1) urban (2) rural (3) legislative and (4) procedural. Motion made by Senator Chuck Gross to form the four subgroups. The motion was seconded by Mr. Carmody and was passed unanimously by members the task force.

Assignments for the subgroups are as follows:

1. Urban – Task force members Thomson, Carmody, Gross, Goodson and Wright
2. Rural – Task force members Holloway, Hobbs, Mills and Thomson
3. Legislative – Task force members Gross, Goodson and Wright
4. Procedural – Task force members Carmody, Holloway, Hobbs and Mills.

Terry Jarrett will serve on all four subgroups.

The second meeting was held on August 18, 2005. Public testimony began soon after the Task Force was called to order. Fifty witnesses provided testimony over a nine-hour period. Many of the witnesses supplemented their oral testimony with written testimony. The witnesses represented a broad range of interests and perspectives and provided the Task Force with useful information. A transcript is being prepared and will be available in the near future.

Many landowners testified at the public hearing, and their complaints were numerous. Many felt that the use of eminent domain to take their property and give it to a private developer for economic purposes was abusive and should be eliminated. Others testified that they did not feel that they received just compensation for their property. Several testified that the condemnor in their cases did not negotiate in good faith or failed to bargain at all. Many landowners complained that in order to get a fair offer, the landowner is forced to hire an attorney and other professionals, making it cost prohibitive. A transcript has been prepared and will be posted on the Task Force's web page at www.mo.gov .

The task force also heard from city attorneys, utilities interests, MoDOT, and other interested parties. A representative from the City of St. Louis testified that eminent domain was a valuable tool in the City's efforts toward urban redevelopment.

After the public testimony concluded, the Task Force decided that the next meeting would focus on working group breakout sessions.

Senator Gross also provided the following report on post Kelo v. New London state eminent domain legislation and legislative activities (applies only to states that were or are in session after the decision was handed down on June 23, 2005):

Alabama

2005 Special Session

SB 68

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. Contains a blight exception.
(Enacted.)

HB 14

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.
(Passed House; failed in Senate.)

SB 81, SB 89, SB 92

Prohibits the use of eminent domain for retail, commercial, residential or apartment development.
(Failed in Senate.)

HB 102, SB 91

Prohibits the use of eminent domain for an economic development purpose and stipulates that its application may only be used for a public use.
(HB 102 failed in House. SB 91 failed in Senate.)

California

2005 Session

AB 1162, SB 1026

Places a moratorium on the use of eminent domain to acquire owner-occupied residential property for a private use until January 1, 2008.

(AB passed Assembly; in Senate committee. SB 1026 passed Senate; in Assembly committee.)

SCA 12

Stipulates that public use does not include taking owner-occupied residential property for a private use.
(In Senate committee.)

ACA 22, SCA 15, AB 590

ACA 22 and SCA 15 stipulate that private property may only be taken for a stated public use. AB 590 stipulates that "public use" does not include taking non-blighted property for another private use.
(ACA 22 introduced. SCA 15 introduced. AB 590 in Assembly committee.)

Delaware

2005 Session

SB 217 (with House Amendment 1)

Restricts the use of eminent domain by the state or a political subdivision to a recognized public use.
(Enacted.)

Illinois

2005 Session

HB 4091

Stipulates that the use of eminent domain may only be for a "qualified public use," meaning for public ownership and control. Prohibits eminent domain for private ownership or control, including economic development, unless approved by the state legislature.
(Introduced.)

Michigan

2005 Session

HB 5060, HB 5078

Prohibits the use of eminent domain to transfer private property to another private entity for the primary benefit of the private entity.
(HB 5060 in House committee. HB 5078 in House Committee.)

Minnesota

2005 Special Session

HF 117, HF 132

Prohibits the use of eminent domain to transfer private property to another private party.
(HF 117 failed to pass. HF 132 failed to pass.)

HF 123

Prohibits the use of eminent domain for economic development purposes.
(Failed to pass.)

New Jersey

2005 Session

SB 2739

Prohibits the use of eminent domain to condemn legally occupied residential property that meets applicable housing codes as part of a redevelopment project.
(In Senate Committee.)

New York

2005 Session

AB 8865, AB 9051, SB 5949

Requires a local government to vote to approve the proposed use of eminent domain to condemn private property for another private use.
(AB 8865 and AB 9051 in Assembly committee. SB 5949 in Senate committee.)

AB 9043, AB 9050, SB 5946

Requires that an economic development plan approved by a local government be prepared when eminent domain is used for economic development purposes. Requires a public hearing to be held and includes additional public notice requirements. Requires the amount of compensation paid to a property owner when eminent domain is used for economic development purposes be greater than

100 percent of fair market value.
(AB 9043 and AB 9050 in Assembly committee. SB 5946 in Senate Committee.)

SB 5936

Stipulates that eminent domain can be used for economic development purposes only if the area is blighted.
(In Senate committee.)

SB 5938

Stipulates that eminent domain can only be used for specified public projects. Requires approval of the county legislature or city council if an industrial development agency decides to use eminent domain.
(In Senate committee.)

Assemblyman Richard Brodsky is drafting a bill that would increase the appeal time for condemnations and allow citizens to appeal condemnation decisions when the scope of a project is substantially changed. If eminent domain is used for economic development, the locality must present a comprehensive economic plan and homeowner impact assessment statement.

Ohio

2005 Session

SJR 6 (not available online)

Removes from municipalities the constitutional authority to use eminent domain unless the power is specifically granted to them by the state legislature.
In Senate committee.)

SB 167

Places a moratorium on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted until December 31, 2006. Creates a task force to study eminent domain issues.
(Introduced.)

Oregon

2005 Session

HB 3505

Authorizes a public body to use eminent domain only if the primary purpose is to allow the public to own or use the property; such property may not be transferred to another private entity.
(Passed House; failed in Senate.)

Pennsylvania

2005 Session

HB 1835, HB 1836

Prohibits the use of eminent domain to turn private property into a nonpublic interest, or for the purpose of increasing the local government's tax base.
(In House committee.)

Texas

2005 Second Special Session

SB 7

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.
(Enacted.)

HB 12, HB 16

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.
(Failed in House.)

HJR 11, SJR 5

Prohibits the use of eminent domain for economic development purposes or to confer a private benefit on a private party, with certain exceptions.
(HJR 11 failed in House. SJR 5 failed in Senate.)

2005 First Special Session

HJR 19, SJR 10, SB 62

Prohibits the use of eminent domain for economic development purposes in most instances.
(HJR 19 passed House; failed in Senate. SJR 10 failed in Senate. SB 62 passed both houses; failed in conference committee.)

The third meeting was held on September 1, 2005. The Task Force members broke into working group breakout sessions to cover urban, rural, procedural and legislative issues pertaining to eminent domain.

The following is a combined list of issues the task force will explore:

1. Notification of landowners
    - More transparency
    - Earlier
    - More widely
    - Simultaneous notification, not piecemeal
    - (Exception: initial scope projects)
2. Alternate routes or sites
3. Limits on term length / Sunset provision
4. Landowner Bill of Rights
    - Reversion to original owner
5. Fair market value
6. Just compensation/loss of income
    - Q: instructing to commissioners v. statute
7. Relocation costs, attorney fees and cost of condemnation
8. Ongoing, periodic payments based on reassessment of property value
    - Q: or based on profit
9. Uniform instructions to commissioners
10. Selection of commissioners; guidelines to judges
11. Abandoned easement property
    - If no plans for use, then reverts to current landowner
12. Use by another entity – transfer ability of easements
    - Private transfer to another private entity (i.e. power → telecom)
    - Marketing of condemned property
13. Taxable event → improvement of property
14. Assessed value → increased taxes
15. Definition of blight
    - Exclude farmland without infrastructure
16. Low-ball clause
    - Penalty for low-balling
17. Replacement value
18. Decisive deadline
    - Accept or reject within 30 days of first "official" offer
19. Fixed formula
    - i.e. 3 times assessed value
20. Appeals
    - Delay of possession of property by condemning entity until appeals settled
    - Appeal to PSC or AHC or STC
21. Five year statute for damage claims
22. Foot print of expanded infrastructure

23. Commission compensation
24. Political subdivisions
    - Who has eminent domain, who needs it
    - Mandatory mediation
    - Review of eminent domain decisions
    - Eminent domain for elected bodies only
25. Public use definition
26. Delegation of eminent domain power both to private and public entities
27. Judicial review and oversight
28. Blighting cornfields in suburbs
29. Mandatory mediation – before condemnation
30. Length limits on term (automatic termination date)
31. Damages through blight
32. Need for interlocutory appeals

It was decided by the Task Force members that the next two meetings scheduled for September 15th and September 29th be dedicated to exploring these issues for recommendations to the Governor. Guest speakers may be invited to these meetings to offer pros and cons on the issues.

Chairman Terry Jarrett will select the issues to be covered at each of these meetings and post them on the Task Force's web site.

The fourth meeting of the Task Force was held on September 15, 2005. The members heard from three panels of experts in various aspects of eminent domain. The first panel consisted of Kevin O' Keefe, Attorney from the Curtis, Hines, Garrett & O'Keefe Law Firm in Clayton; Greg Dhorman, Assistant City Counselor for St. Charles County; and Steve Mauer, Attorney at Bryan Cave in Kansas City. All three panel members have experience in representing municipal and county governments in eminent domain proceedings.

Mr. Dhorman explained the process St. Charles County uses for obtaining ownership of property when constructing new roads. The construction of roads in St. Charles County are mainly needed due to either existing roads not being safe or the need for new roads due to residential developments. Roads, which have the higher accident rate, are the first roads to be worked on. Typical road construction projects in St. Charles County are 1 ½ mile long. In a road construction project of this size, the development stage shows there are typically 45 different landowners to be contacted. Out of the 45 landowners involved in this particular project, only 3 could not reach agreement and the County was forced to enter into the condemnation process. Most of the lands taken are partials and rarely are total takes required. Many months, and in some cases years, are spent acquiring the land rights for these construction projects. Mr. Dorman had previously worked in Virginia and noted that the state uses "quick take" powers, but that is limited to roads and utilities. The condemnation process used in Missouri is different. We must file the condemnation petition, but must first go through the good faith bargaining process which is pre-requisite for filing petition; obtain service on the land owners and then set up a hearing date for

any judicial hearing in a court and the burden of proof is on the condemning authority to show that the proper procedures were followed. At the conclusion of the hearing, the court appoints three commissioners and charges them with going out into the community to view the property, hear evidence from both sides and then return their report with the value. The report is then mailed out to all parties involved and only when the county receives the report that they then pay the monies directed in the report does the county take title to the right of way and easement necessary for the roadwork. This is a much longer and more cumbersome process than the "quick take" process used in other states. He also noted that the "quick take" process couldn't be used in Missouri because of the constitutional protection. After the commissioners' hearing each side has the ability to take exceptions to the awards and ultimate end would be a jury trial.

Mr. Steve Mauer spoke about the appraisal process and good faith offer. Downtown Kansas City is now in the process of renovating an 11 square block area, the greatest thing to happen to downtown Kansas City in a decade. As part of this process they had to acquire over 44 different parcels of ground, and brought suit on 22 and of all those suits there are only two left. The process has worked very well and during part of the appraisal process some landowners came forward and said their buildings were worth a whole lot more than what was offered. When they went back to the appraiser, he stated that he went to the office and the owner wouldn't let them look at parts of the buildings, such as the second floor. The commissioners valued the property higher but given what the appraisers had to work with they valued the property correctly. The landowner is not required to let the appraiser into the building or property or even talk with them.

Kevin O'Keefe discussed the landmark case regarding the redevelopment project in St. Louis County (West County Mall). The mall represented the old style of malls. Site is bounded on three sides by roads. Fourth side is a cemetery. Mall sits on a 50-acre lot and had 500,000 sq. feet of shopping available and parking on the 50-acre site. The mall became economically disadvantaged and competition and growth by different forms and other malls became larger offering greater merchandizing. As a result, the West County Mall had increasing vacancies and season occupancy as opposed to long-term leases, it had declining sales tax revenue and the revenue was critical to the city's ability to provide service to residents. Recognizing the circumstances, and recognizing that there was no place to go to add to the mall, the city exploited the possibility of utilizing tax increment financing for the economic revitalization of this economic engine (the county mall). One of the reasons why public involvement was considered to be potentially appropriate was because the site is hamstrung by its location. It had become ineffective in the late 1990's and in order to bring it up to a marketable condition would require in excess of 1,000,000 sq. feet of shopping and to do that on a 50 acre site there was no additional land available and meant that parking for the customers would have to be structured. Cost of parking space increased from $1,000 per space to $15,000 per space and required the construction of a parking garage integral to the project. The overall cost of the project was approximately $250 million and involved the utilization of $29 million in TIFF revenue tax increment financing. Condemnation was available to the developer or redeveloper (owner of the mall) in this case. This is what ultimately occurred. The reason Mr. Carmody wanted to bring this issue up is because the city met with the TIF

commission originally and the city made the determination that the county mall was blighted. The blighting decision was made at a time when the mall was providing approx. 20% to the city revenue. Operating on what appeared to be a successful business. When charted out, revenues were rapidly declining and the assessed value of the property had declined, the competition of regarding rent was declining. There were also physical characteristics of deferred maintenance and the layout of utilities, which fell into the traditional definition of blighting in TIF statutes. The key to the matter however was the determination was that the property was economically underutilized. This was a determination that the city made based on previous litigation with economic tools primarily a case in the City of Crestwood Drive-In. The redevelopment of the drive-in would be much more effective for the community as a whole that it be used in a manner that would generate more revenue for the city. On that basis, the city realized that West County Mall, which physically present, was not the economic engine that it had been and would have hoped to be. It was economically underutilized. City agreed to participate in the tune just shy of $30 million by tax increment financing. This decision was ultimately supported by the school district. The entire TIF commission including representatives of St. Louis County who sat on the TIF commission also supported it. The determination was challenged in court. Litigation ultimately found its way to the appellate court of Missouri. On the grounds that an affluent community with a functioning non-abandoned mall could not utilize the concept of blight in order to take advantage of available economic tools under the statute. Both the trial court and the court of appeals agreed with the city's determination that economic underutilization is indeed an inherent element in the concept of blight under the Missouri statute and under frankly common sense. It is not necessary to wait until deteriorization or physical abandonment of property in order to determine that its course is inevitable and that its role in the community has ceased to perform. That case has become important as other communities seek to apply the economic development statutes as tools that are available to them across the state. Because of its recognition first of all that in our separation of powers environment that it is not up the courts to make its independent judgment as to the best course of action that a community should pursue among its alternatives. Recognition of the fact that economic underutilization a better idea that serves to provide a service base for the community to serve its residents and provide new environments for its neighbors and serves as a keystone to development of adjoining and nearby areas that has also occurred as a result of the city's infusion of this capital and credit in this case. Other areas nearby have also refurbished and redeveloped without utilization of eminent domain. Determination was appropriate to find the area blighted. In other areas of the city the use of eminent domain has been used as an economic development tool. Example: Hazelwood and Mills Outlet Mall area.

In the example of West County, eminent domain was not used it is certainly used for projects like that as Mr. O'Keefe pointed out. Topic of discussion because there are municipal bodies making findings that have tremendous judicial deference.

Questions:

Q: Were most of the landowners aware of the road proposals before they were approached for sale?
A: Yes, through public hearings. There are also three and ten year transportation improvement plans that are also available to the public. Public hearings precede the right of way design stage that is used to solicit input for the design of the road itself.

Q: What are reasons why about 10% or less of the land owners hold out and not sell?
A: Most people are opposed to the project in general. Most of these landowners when they purchased their house were in the middle of a field and did not want neighbors and don't like growth in general. However, the average landowners are agreeable to the acquisition.

Q: Are values of property owners increased due to improvements made in the roads?
A: Yes. Many times due to the improvements, the classifications of the property are changed or the elevations of the house to the road are raised or evened out. The opposite might be true if the elevation of the house is lowered because of the new road.

Q: What other typical factors go into considering what other road improvements are going into the three and ten year plans?
A: Most importantly in St. Charles County is the safety factor. The County Road Board considers the safety of our roads and the accident statistics are the most important factors in determining which roads are selected for improvements.

Q: Is it true that in Missouri the trend is to do more transportation sales tax or road impact fees because of the growth?
A: Definitely, in St. Louis County we rely heavily on the transportation sales tax to contribute.

Q: How does the construction of roads interplay with utility construction or acquisition?
A: The two are highly related because utilities use the road right of way. We can regulate how they do it and make sure they clean up the site when they are finished.

Q: What would be the impact to government and utilities if eminent domain were not available or severely limited or made more cumbersome or difficult?
A: In extreme cases, if eminent domain were not available we could not do the road projects because some people would just not sell. Without eminent domain roads, utilities, sewers, etc. just would not be built or installed.

Q: What are the legal requirements or statutory requirements to negotiate in good faith?
A: If good faith bargaining is not used, the petition would not be approved and the judge would not permit you condemnation of the property.

Q: Are there any penalties involved?
A: No, but if you could not convince the judge that good faith bargaining was used; having to go back could cause project slippage. An example where good faith bargaining

was thought to have occurred, but the petition was not approved by the judge was when the owner of the property in question refused the offer but did not let us know that they did not legally own the property but that the property was put into a trust. The good faith offer letter was then sent to the husband and wife as trustees of the trust.

Q: What are the panel's thoughts on implementing a penalty for the condemning authority for not using good faith bargaining or for low-balling?
A: If there are to be penalties, limit to "total" takes and use the appraised value of the property not the accessed value. There are laws specifically spelling out what constitutes good faith offers and this is the device used to make certain that good faith offers are made for acquiring land from the owners. It was also noted that there could be serious funding repercussions, including federal highway money, if the regulations and procedures are not adhered to in the evaluation process of deciding on the value of the property.

Q: What is the notification process for notifying landowners?
A: Public notices and then individual letters to the property owners

There has been discussion on the task force about recommending penalties be enforced if the appraised amount is lower than the commissioners award, the percentage not yet determined. Does the panel have thoughts or recommendations on what might be more manageable to protect the land owners from low ball offers, but at the same time not penalize inappropriately for circumstances as described?

Panel suggestions: penalties should be limited to only "total" takes. With respect for a partial take for a road widening, opinions can vary widely as to what is the value of the remaining vs. the value of the whole. In any circumstance, limit the possibility of penalty to total take. Second, if it is going to be taken from anything, take from the appraised value not the assessed value utilized by the counties and used for establishing the tax rate by the county.

Q: Do you as a condemning authority always, as a matter of routine practice, look at the assessed value of the property from the county before making a good faith offer?
A: He can't state what everyone does, but the panel agreed that they do. The counties' system of property assessment is an effort to establish fair market value of the real estate of that county based on data they obtained by appraisers and historic data and knowledge of the market. Property owners have the right to appeal the assessed value of their property and challenge the assessed value of their property. Every two years property owners within the state receive a statement as to what their property is valued at. Most only appeal if they think their property is overvalued, not undervalued. If there is one base line, the assessed value of the property by the county is one that could be used and readily available, objective and informed valuation of the property. Assessed value of a home or property is the legal agreement between the owner and the governing body. The problem with establishing some sort of penalty for a bad faith offer is where we get into a partial take situation. What are the impacts of a sewer line, easement, etc? For instance, sometimes when a sewer line is put in, the property is now measured not by the acre, but

by the foot because it is now developable and the property is now primed for the next subdivision or shopping center. You are now improving the property and doing the owner a favor. This doesn't mean however, that in the property owner's mind their property value has increased.

Q: Use hypothetical sewer line you talked about, you believe land owners are compensated fairly, but when the next assessment rolls around, the land owners have an increase in the value of their property and through no fault of their own, taxes go up, you have improved the value of their property. That can happen, right?
A: I don't believe so because the actual use of the property is always the counties' assessed value. If the landowner is using it as agricultural, it will be assessed at the lower level as opposed to 19% residential or 33% commercial. Utility easements may be different. In Kansas City when some rural property owners gave easement rights to utilities, they made special assessment against the land to help offset the actual cost of the utilities. In a sense, landowners are baring a double burden. State laws are being addressed to help this type of situation (Ridgeway).

Tax code can change if the landowners realize that they are sitting on top of more valuable land and chose to change the classifications from agricultural to commercial or residential. In Kansas City when a sewer or utilities easement is given, the landowner experiences no extra costs. The costs are usually borne by the city or by the residents using the service. If in the future, the landowner begins tapping into the utilities or sewer line, then they are charged.

Q: On low-balling – does the panel believe that penalties need to be assessed and if this would help?
A: The panel stated that they all believed that low-balling does not occur routinely and the safeguard currently in place is that the judge would throw out the petition of the condemning authority.

Mr. Carmody brought up the fact that the law of the state is that a "good faith" offer if it is in a form that could be accepted by the party on the other side. For instance, an offer of $1.00 for a $100,000 property, by law, could be deemed a "good faith" offer by the judge if he applies the law of the state strictly, then the law of the state would not inquire into the amount of the offer, but only into the fact of the offer. Does the panel agree? None of the panel disagreed with Mr. Carmody, but all stated that in their experience had never seen this happen. Evidence has always had to be explained and shown as to how the amount was derived. Fact of the matter is a statutory device may need to be established to make certain it is a good faith offer. Circumstances may be the extreme where there are low-ball offers and land owners cannot afford to go through a process that is expensive and time consuming and frightening for them and that they have to accept the low ball offer. Give thought to this matter if the law is as I believe it is, defining good faith negotiations and that the adjective "good faith" had good meaning. Abuses do exist and the power of eminent domain in the wrong hands is very dangerous.

The task force has a list of 32 items that it is exploring and then asked the panel to address some of the specific items.

Issue #1, Notification of landowners. Panel said they go through a long deliberate process of notifying landowners and all sorts of public notice and letters are always sent to property owners about a public hearing. Publish and post always. If anything, what the panel hears the most is that there is too much notice and talk about new roads, bridges, new sewers, etc. Discussed Penner family dilemma. How can task force eliminate the cloud that landowners are under in development and re-development content this notion that somebody's property is under the cloud of taking. Specifically in economic development context or plan. Statute says 5 years that you have to exercise the power of eminent domain. Correct. Other statues in the state where there is no similar limitation. Those are the kinds of specifics the task force would like to discuss. Solutions to help the landowners without necessarily ruining what we have in terms of growing the state.

Panel said the 5-year taking limitations under TIFF statutes have not been problematic and its applications to some other type of economic development may be feasible. Some of them may be difficult, such as LCRA and agencies involved with nuisance abatement, difficult to peg. 5 years seems to be manageable.

On the subject of Notification … meetings are subject to sunshine laws and have not found a politician yet who does not tough highly visibly about a prospect of a great economic opportunity and make sure that everyone knew about it at the earliest opportunity. Very little likelihood that a reasonably attentive community member is not aware of the possibility of an impending development.

Issue #4, Landowner Bill of Rights. One recommendation by panel member would be that the process takes too long. If it's going to happen, lets just make it happen. Let me get what I'm going to get and get on down the road. Some times you can have a temporary property easement last for years. Consider putting a time limit on temporary easements for construction purposes … use it or lose it provision. If you don't get underway in a year or something like that, you lose it.
Make the condemning authority plead how long I am going to take it. Plead from the day it starts.

Stating a defined time for easements would solve the #3 issue.

On road constructions easements, defining a one-year time limit would generally not work, but spelling out the defined time limit may help (i.e. one year to do this part, 6 months to do next part, 3 months for final) could be considered. Rule 86.04 pleads how long condemning authority would take.

Don't take easement, or deposit money, until project is ready for that part of job. Time limit can start running at the time of deposit. Limitation time limit already in TIF statutes. Time limit (5 years) on project approval.

Condemning authority can actually pay the money in take ownership of the property, file exceptions, go through whole process and if the jury awards a great big number the condemning authority can still say "I give it back" and they can get the money they already paid in. Cannot disturb building or property.

Issue #7, Relocation costs, attorney fees and cost of condemnation. Interested in panel's comments … is this a problem? In TIF it is common to pay a lot of relocation costs, federal rules are followed. Some areas have adopted this practice. Attorney fees – typically contingency may vary, generally attorney fees are 1/3 over the last offer received for the take. Most of time the clients will pay the expenses, etc. and will come off the top of the award.

Issues #9 and 10 dealing with commissioners … does panel see any advantage to having some instructions to the commissioners, how they value property, etc? Panel said absolutely. New commissioners are usually educated by the old commissioners as to proper scope of their duties, written instructions are available in some areas. No procedural requirement in place for that now, just a practice of doing it. Training and prior qualifications for commissioners would be good judgment. Scale of the taking may judge the scale of the qualifications. Having a retired judge of the commission panel may be good idea. Key is uniformity across state.

Issue #26, Delegation of eminent domain power both to private and public entities. What is panel's perception to granting power to many? Panel members believe that requiring the PSC to come down on the folks that are abusing eminent domain is valuable option. Private companies have been source of problem in past. PSC does not have regulation to stop these private companies from exercising eminent domain once they have given them the power. Suggestions - make the private developer if they want to do eminent domain prove to the commission or authority that they have done all the notice, etc. Require PSC to sit up and take notice that when they get a complaint about an abusing authority, make PSC hold hearing on that. Library has their own authority; fire districts have their own authority, etc. Too many pockets have this great power. Power should be back at the elected official level. That would work except that you have many small sub-divisions that aren't elected. Counties should have the power of eminent domain for fire, water, sewer, etc. Some uses of eminent domain are to clear title. Example – private sewer company, who was also the land developer, who was also the realtor, got all their power from eminent domain and they got the power from PSC. No one to supervise that.

Panel was asked about process and how they would recommend solving issue service territory having condemning authority reviewed? Process would apply more broadly to company like Ameren. Recommend one of two things. Either before they can condemn that would have to state purpose, get approval from either the PSC or the county in which the property is located so that at least someone is reviewing their determination because the standard is that once you have the power of eminent domain the judge has to defer to the determination and can't argue. Nobody to look at it and say, wait a minute, this is not the best place. Sometimes condemning authority using as a profit motive or to line their

pockets and didn't give proper notice, etc. Make the condemnation forced to file be approved by PSC or county commission where the property is located. Task force member emphasized that with this proposal, at some point putting in the political process. Questioned whether political motivation would overshadow the justification and be extremely bureaucratic. Municipality should be higher authority.

Discussion about libraries in particular and how they are not governed by higher authority and are self-sufficient. Draw distinction between building a library using eminent domain and running a sewer line for a fire station. If library can't obtain land using negotiation process then they should not be allowed to use eminent domain. Task force committee does not have time to go through list of companies that have been given eminent domain authority to decide who should have authority and who should not. Ultimately, general assembly could construct the balance. Use recommendation process … library comes up with plan; they go the municipality who grants eminent domain.

Issue #32, Discussion on interlocutory appeals. Once the condemning authority pays the money into court, it sits there and if the landowner comes in and takes the money out, then the only issue remaining is the value of the property. The landowner can no longer say, but you should have never taken it in the first place. None of the pre-requisites to condemn it are still there, they are gone. Unfair hardship on land or property owner who may need money and there should be something the task force can do. Probably the exception rather than the rule in dealing with something like this. Requiring appeal at earlier stage may serve everyone well. Mandatory appeal could be very helpful, how is task force going to structure that. For many property or landowners in the blight case, have everyone participate in the early appeal process and appeal can be done in the development process. Condemning authority should have appeal right also. Appeals should have short window. Challenge blight only. Early blight determination in development stage. Normally landowners can't appeal until the end of the case, and only after complete process can the landowner take appeal of the very first decision by the judge. Can be time consuming. Interlocutory appeal would give the right to say that decision is wrong and go straight to the court of appeals to get a review of that decision. On condemning side, the time for an appeals court decision could be crucial. Could really slow down projects. Suggestion would be to make private companies, before they can file for condemnation, get approval from the body that gave them eminent domain power, be it the county or the PSC. Rural electric coops are not subject to PSC, need something different for them.

The eminent domain task force asked that the panel supply specific recommendations or proposals for consideration to the task force and send to Terry Jarrett as quickly as possible. Clear that there are going to be some changes and it would be helpful if professionals such as the panel have specific recommendations on legislative changes or rules changes and get them to the task force for consideration. Need specifics.

The second panel consisted of representatives from MoDOT, who were asked to provide a presentation on their eminent domain program. Pete Donovan, Attorney and Terry

Sampson, Right of Way Director. Also present on the second panel was Robert Angstead with Newman Comley & Ruth (mediator).

MoDOT has a success rate of between 89 and 91%. Follow uniform relocation assistance and rural property acquisition act (uniform act) on every property. Followed on all cases. Ensure that all property owners are treated fairly and all property owners that are displaced as a result of the project are treated fairly. Responsibility of balancing property right for the property owner and also for the taxpayers of the state is a delicate matter and do it the best they can. Detail on what we do on environmental side. Work with DNR, Dept of Conservation and SEMA to ensure that projects do as little damage as possible in the selection of where the projects go. Consider endangered species, flood plains, wetlands, parks, air, water and social and economic impacts. Hold series of public meetings with purpose of notification of some of the concepts that are being tossed around. Project Management team determines early what impacts there are and how we can avoid some of the impact to the properties. Through public meetings get landowners ideas and input into the projects. When preliminary plans are done have public meeting with presentation and get feedback. Also have location hearings, policy requirements and have design public hearings that will show individual impact of property and work with owners to get changes implemented if there are changes the owners would like to see. Right of Way process explained. First stage after public meetings is description writing. Determine whom the correct title owners are, prepare legal documents. Fee study is done for appraisal problems. Look at parcels that are affected, determine problems or complexity issues and assign appraisers based on this study who are experienced to handle that type of appraisal. Fee appraisers are hired when issues may become complex or situation dictates. Approaches typically used are sales comparisons (compare like properties) or income approach. Approved list of fee appraisers that MoDOT uses. One of the goals of the department is to increase list of approved appraisers so that there will be a big pool statewide and to get property owners more involved in the process. We think that property owners may be used to help in the selection of the appraisers and get them more involved in the process. Once appraisal is completed, review is done of the appraisal and is done by an in-house reviewer who is state certified and has to comply with uniform standards of appraisal practice. Negotiation is next step – have approved offer to make to landowner. Negotiator in 90 some percent of the time goes to the house or business and meets with the property owner, sits down, gives them brochure explaining process, give them a highway map, business card, colored plan sheet showing the effect on their property and the larger affect of the overall project. Offer is in writing. Give owner copy of the appraisal, copy of the general warranty deed and date that they need to convey property to us by, copy of the escrow agreement, sales agreement and request for tax payer ID number. Negotiator typically spends an hour or more in the first meeting going over details and serve as liaison between property owner and the department, counter offers or additional information that is sought or that the department didn't supply. Administrative settlements are made based on this information which are settlements made above and beyond the original settlement. In the appraisal process we almost always ask the property owner to inspect and accompany us on the appraisal. Ask the owner if they know of like sales in the area that could be used as comparisons. After all negotiations are used to settle (91%) last year, alternate step is mediation. Mediation

is not mandatory but it is mandatory that it be offered to the property owner. In every case, with the exception of title issue or design issue, mediation is used. Mediation waiver cannot be done at the local level.

Referred to Mr. Angstead regarding mediation. 46% of the owners who have sought mediation have settled. Two step process past mediation. File petition, hearing, 3 commissioners are chosen. Believe some sort of qualifications for the commissioners is a good thing. Wise to have qualifications for commissioners. File exception within 30 days goes to jury trial. Many legal settlements are made past that as well. Only 1% of the actual parcels that are condemned go to jury trial. Quality assurance done every year to see if our processes are working. 91% last year on successful negotiations. Looked at cost estimates, highest and best use analysis, appraisals and mediation. Also looking at incentive offers to sign. Send our customer opinion survey after every payment and 84% are satisfied with negotiation process. 88% feel MoDOT is trustworthy. Relocation assistance program – offer advisory assistance or payments to individuals displaced as a result of the project and/or who have to move items of personal property. Uniform act was recently updated and getting changes implemented now. It is critical to treat people fairly on every project.

Robert Angstead has been a mediator since 1992. Mediator in MoDOT's condemnation cases. Outline of process that he goes through (1) write land owner and MoDOT representative seeking date, location for mediation session and agree on date, time and location. Mediation is either at the MoDOT offices or at Mr. Angstead's office here in Jefferson City, in county court houses … places where it is not going to cost anybody anything. (2) appear and mediation and ask parties to sign mediation agreement that states 12 things. These are: everyone agrees to participate in the session, mediator is not a judge and has no authority to impose settlement, parties may consult with an attorney at any time during the session including using a telephone, mediator cannot represent either side, mediator has no interest in the outcome, explains what a caucus is and how it is used in the mediation session, information gained by the mediator in the caucuses cannot be shared with the other party, session is confidential, no statements made will be used in any proceedings, cannot subpoena mediator, anyone can terminate the mediation at any time, waive conflict with the mediator or involved parties. Mediations are informal and on a first name basis. Landowner goes first and then MoDOT goes. Questions are permitted to be asked by either party. Parties are then broken up in two separate groups to try and reach agreement or move closer. Typically an hour to an hour and a half is spent going back and forth between the two parties. A copy of the mediation guidelines will be sent to the task force for review. At some point either an impasse or a settlement is reached. If impasse is reached, mediator sends everyone off with strong urging to continue negotiations and that usually happens. If agreement is reached, papers are signed immediately during the mediation session.

Section of MoDOT manual on mediation will be sent to task force.

Questions:
Q: What is the cost associated with mediation and who pays?

A: Mediator's time is billed on a negotiated rate per hour including travel time. Landowner has no cost. The mediation is paid for entirely by MoDOT. MoDOT uses a pool of mediators on a statewide basis.

Q: Have there been concerns expressed by the landowners that the mediator is being paid by MoDOT?
A: Mediator tries to dispel this notion immediately. Landowners at first are very skeptical of mediator when being paid for by MoDOT but this issue is discussed and usually land owners become satisfied that the process is equal to all involved.

Q: Can you discuss the McClaren case?
A: In 2001 commission report was filed. Mr. McClaren never drew money out. Once money leaves MoDOT's hands and is in the hands of the court, MoDOT cannot control if the landowner takes it. Critical issue, having tried dozens and dozens of condemnation cases, the vast majority involves a breakdown in communication. That is why we believe mediation is a big help. In Mr. McClaren's case it is a situation where Mr. McClaren said there was going to be a drainage problem in the after condition. Three days before case was set to go to trial everyone got together and Mr. McClaren allowed MoDOT's appraisers to go on the property. Prior to this MoDOT was not allowed on the property. After the appraiser saw the damage and the drainage problem in his field, MoDOT in process of settling case. Probably a year and half of litigation could have been avoided if things had been communicated better. The taking of property, when the seller does not want to sell, is one of the most significant powers that government has besides the ability to tax and to send someone off to fight a war through the draft. This is an example of mediation would have been a big help. This was a federal grant project that MoDOT gave to the City of Washington, so the city had control of this project. Washington was building an airport. This was not a MoDOT condemnation.

Q: Common complaints regarding condemnation process?
A: Biggest complaint is just that the condemnation process is happening. No complaints about the MoDOT field people, negotiators, except that they are being cheap. MoDOT does not do private condemnations for developers. MoDOT condemnations are for public roads.

Q: Estimate of rough percentage where mediation is successful?
A: Roughly 50% are completed with closure. Mediations that settle do not always settle right there in the mediation room. Some parties continue to dialogue and often times within 2-3 weeks to a few months, settlement occurs.

Q: Do landowners in mediation bring counsel with them?
A: About half the time.

Q: If landowner agrees to mediation can the landowner request his own mediator?
A: Never had that happen, but if the mediator is on MoDOT's approved list, with qualifications, and/or if the mediation meets the qualifications that MoDOT's mediators meet, then MoDOT would probably agree to the landowners' mediation request.

Q: Does the subject of land being owned for several generations come up within the mediation sessions?
A: Not in any of my mediation cases.

Q: Is the process designed so that there is only one mediation session?
A: There is no cutoff as to when we stop talking. If the process is working, we should be working to settle the case at every stage of the process. Jury trial rate down to about 1 ½%. Often times we find that a breakdown in communications has occurred when a case cannot be settled and reaches the inside of a courtroom. MoDOT only offers one mediation session, but stresses continued dialog and has never turned down a subsequent mediation request. Mediations could go multiple days.

Q: How does the sighting of the route come into play?
A: On the sighting of route when the project is in its infancy how many route sighting when you have a public meeting do you show and what is the frequency that the top choice is the one that is ultimately decided on, especially after hearing public testimony? Don't know statistics. Would have to ask someone in the design section. But because of the public hearing process MoDOT learns a lot about stuff that they didn't know. Had situations where we didn't know that there was an old public cemetery in the middle of our alignment. As a lawyer, when I find that out, the road goes somewhere else.

Q: When do the people that live along the route that is chosen find out, is it when the MoDOT representative comes to their house, or is there another meeting to let everyone know that this is the route chosen?
A: It depends on the size of the project, the number of acres impacted and the overall complexity. It is usually at the location hearing when the actual road layout is announced or the subsequent design hearing. On a smaller project, it is done by more word of mouth, by telephone, that sort of thing. The project manager may speak directly with the property owner on smaller projects.

Q: What is process for contacting people along the selected route?
A: Don't believe a letter is sent to everybody, but would have to check with project manager, but on smaller projects the project manager calls or goes to see the landowner. On larger projects, we advertise in newspapers, or radio. At design hearings invitations are sent to all affected property owner telling them about this meeting. Follow-up will be done on this particular question to make sure answer is correct.

Of great concern to everyone on this task force is the notion that many times the land owners know nothing about the taking of their land before they receive a certified letter in the mail and presented with an offer on the property (not necessarily talking about MoDOT) and the land owner has 5 days to respond. This is of great concern to everyone on the task force.

On larger project at the design hearing, letters are mailed to the property owners. On smaller projects, it is on a more personal level.

Comment from MoDOT official, have had occasion to try dozens and dozens of lawsuits, many of which were eminent domain cases, along with quite a few appeals, what I would like to suggest does not favor penalty provisions as a statutory fix for low offers. From MoDOT's perspective, just because a final result as a result of a jury trial, the award is higher than a previous offer, does not necessarily of itself indicate that is was a low-ball offer. Juries return verdicts for different reasons. In condemnation cases, many times they are not related to land values. Penalty provision is not the way to go and more importantly, other than the fact that just because the final amount is higher doesn't mean that somebody necessarily made a mistake. Generally, and from speaking with counterparts from other states, these provisions have the tendency to encourage people to loiter up. From our view, it is better to get people talking without introducing lots of awards. Other states usually have higher than 9% condemnation rates. General trend we believe from that kind of a statutory amendment would be to encourage rather than discourage litigation. Mediation is the better approach. MoDOT's approach is that if the landowner doesn't bring a lawyer to the mediation session, then MoDOT's lawyers stay away also.

The third panel consisted of Judge Julian Bush from St. Louis City Circuit Court; Phillip Dennis, Commissioner and Patrick Cronin, City Attorney, Rocheport. This panel discussed the judicial procedures and issues in eminent domain lawsuits

Judge Bush has been judge for over 10 years for city and handled about ½ dozen condemnation suites. First learn about a condemnation case when petition is filed and then a summons is issued to the landowners. Consider whether or not the condemner has the power to condemn. The landowner usually has no defense for condemnation. Will usually find that the government or development agency has the authority to condemn. Rarely is this contested, never seen this contested, although have read about it a couple of times, blighting situation was involved. Usually no contest over the power to condemn. Then, appoint 3 commissioners, and charge them with obligation to make a fair appraisal of the property and report to the judge the value of the property. Report is received and at that point both parties have the option to challenge the commissioner's assessment. If either party files exceptions, then there is a jury trial. Most often the cases are settled before the jury trial. In the jury trial, just as in every other jury trial, the jury will place their evaluation on the property. If the evaluation is more than the commissioners awarded, the contemnor and either come up with the additional money or abandon the condemnation. Never had a trial of condemnation case as far as damages are concerned. Confident these are very simple trials. Landowner testifies as to what he believes the property is worth and the contemnor put testimony on by an appraiser and then it is up to the jury to determine value of the property. The only requirement today for a commissioner is that they be resident of the county and owns real property. Judge believes that he could appoint better qualified people if the qualifications were fewer not greater. Explain: disqualification for person who lives in an apartment. These people might be very bright and had owned property in the past, but currently do not. Could

appoint people judge feels are better qualified if he does not have to labor under that restriction.

Mr. Dennis … recognizing that the developer often comes in with resources that are superior to the individual, one of the things that we do is try not to hold the individual to the higher standards of the developer. For instance, the developer has developed a slick packet with plan, pictures, etc. and paid appraiser with exhibit or his own and many of these things would not be available to the average landowner. The landowner can basically give you their testimony on the value of the property. Also look at four types of property that we see. First, we see totally dysfunctional properties (buildings that could not house anyone), second is undesirable building (may be some characteristics of this particular property that make them undesirable for a neighborhood that is being improved and those undesirables could be criminal activity, house itself has a look that is basically past. Next step up from undesirable is incompatible, in other words the development scheme does not allow that property to fit in. Top level is the acceptable level and could go either way. This means that the developer could leave the property in the plan of scheme but is part of the developer's interest to have the entire block rather than just pieces of the block. This means that the developer has control over the market price and other things a little better than if he had spots in the plan that he did not control. When we are looking at that we also ask the owner some questions. For instance, did they have insurance on the property? It goes a lot toward what they think the value is if they actually have insurance on the property. If there is no insurance then that says to us that the owner did not place as much value on the property. Also look at other things such as the type of brick used in the building, type of repairs that were done prior. Forbidden at looking at repairs or improvements that were done after the amount has been announced. Value is accessed at the time prior to the actual buying of the development. Cannot look at how many generations the property has been in the family. Often see land owners wants a lot more money than the developer wants to pay and it's always a matter of us sitting down and listening to all of the things just talked about and determine what the actual value is. Often the value is something in the middle. Commissioners then have to sit down among themselves and defend their points and have to come to conclusion and value as a group. Some city homeowners who have lost their property have left the city and gone to the county. Concerned because these displaced homeowners were members of the community and paid taxes.

On an appeals case the commission has looked at the delay of possession of property by condemning entity until appeals are settled. Title wouldn't pass until the end of the appeals.

Questions:

Q: Have any of you seen or experienced low-balling?
A: The assessed evaluation is the floor. If low-balling does occur, the judge has the course of action to throw it right back out.

Q: Do you see value in having a set of uniform instructions for the commissioners to give to them to help in evaluating assessments, similar to jury instructions?
A: Some commissioners who do the work don't have a clue, and some sort of set instructions would be good. Most of the commissioners are very intelligent people, but have asked what their charge is and what do they do next. Most of the time one lawyer is on the commissioners group and he takes the lead.

Legislation to put out list of suggestions of say at least one of the commissioners could be a lawyer or banker (someone with knowledge of land value). Best served when you have a commission cross-section of people in different capacities. Generally speaking the judge wanted a lawyer on the panel and appoints people that he has confidence in and who he knows. Cross section of the community and therefore the judge usually tries to appoint commission with different races and genders on the commission.

Q: Is the number of commissioners too low, should the task force recommend adding more?
A: The bigger the committee is the harder it is to reach consensus. Suggest leaving at three. Issues can be handled better with three people with one being a tiebreaker if there are problems. It would also be harder to fill up the number of commissioners if increased. Someone is also going to pay the commissioners and the more that is required means extra charges.

Q: On the issue of fair market value, does the fact that the property has been in a family for generations have any effect on the value?
A: Sentimental value has no place in fair market value. Appraisers will not put value on the fact that land has been in the family for many generations. The commission considers compensation for emotional impact, etc.

Mr. Cronin discussed that they have never taken a farm that is in use. He said problems have occurred when they take a house that has been inherited and they have had it for 20 years and never had a tenant in it, never done any repairs and really needs to be torn down; but there is emotional attachment to the house. Almost every small town in Missouri is full of houses such as this. At some point someone has to face the truth, because that house destroys the value of the properties around it.

Q: Does the commission look at the value of a residential house which he going to be torn down and the property made into commercial use; does the commission take the value of the land that is being made into commercial or look at only residential value?

A: The commission looks at if the property taken is residence, then we look at what the owner can replace residence for. Look at displacement of the individual's property and replacement of a similar structure. Law looks at how the property was used when the developer filed and therefore if was residential and maintaining it as a residential property then that is what the commission looks at.

Mr. Cronin said that the system that is in place is very fair when both sides have attorneys. Mainly, only the condemning side has attorneys. Whatever fairness there is, is because the attorney puts it in there and for that reason he would like to see some sort of training for the commissioners. Don't think they have to be qualified state appraisers, but he does think they ought to be in the legal, real estate or banking business.

The next meeting of the Task Force took place on September 29, 2005. Expert guests in the area of Eminent Domain were invited to address the task force and answer questions. The first speaker was Professor Dale Whitman an expert on property law and the author of several textbooks on property law. He currently teaches property, real estate finance and land use planning at the University of Missouri-Columbia School of Law.

He spoke of the application of the public use concept in situations where an eminent domain taking results in the property being placed in private hands. That is the fundamental issue in the Kelo case and the motivating force behind the creation of the task force. In the 19 century the eminent domain power was widely given by states to railroads, mills and lots of other private enterprises. In these situations usually the government didn't even bring the eminent domain action. The private entity, the railroad for example, could condemn directly. The public was benefited in a sense by these projects but the government didn't condemn the property and didn't end use the property directly. The Supreme Court upheld this use of the eminent domain power in a mining company in 1906. That case involved a mining company that wanted to condemn property for an aerial bucket line on some property that was privately owned. They did condemn it under state law and the Supreme Court upheld that that was alright. In doing so what the Supreme Court did was to take the term "public use" as it appears in the Fifth Amendment and redefine that as "public purpose". The next significant case wasn't until 50 years later in 1954. It involved the redevelopment agency that was doing the urban renewal in the southwest Washington area. The redevelopment agency operating under the urban renewal program created by Congress in the early 1950's was purchasing slums, consolidating the property and turning it over to private developers. The question was whether it was public use and the court said that it was public use being defined as a public purpose, the public purpose being the elimination of slum and blighted properties. The court continued to follow on this same trend of not being very concerned that the property would end up in private hands. The next case 30 years later was in Hawaii and it involved land that had been retained by trust created by the original missionary families when they had settled Hawaii and acquired the real estate title. The trust would lease this property to homeowners on long-term leases rather than outright selling it, typically 99 year leases. The legislature in Hawaii decided it would be desirable to allow people to acquire the title to their houses by paying the trust the value of their reversionary interest. The Supreme Court ultimately upheld that. There was nothing physically wrong in the sense of being slum or blighted with the properties involved. The description that Justice Stevens gave in the Kelo case when he said that the court concluded that the state's purpose of eliminating the social and economic evil of the land oligopoly qualified as public use. The public purpose that the city asserted there was the reunification of the city's economy and its tax base. A sentence from Justice Steven's opinion: "promoting economic development is a traditional and long accepted function of government, there is

moreover no principled way of distinguishing economic development from the other public purposes that we recognize." He concluded that there was a sufficient public purpose in the economic rejuvenation in the city of New London. One of the things the court refused to do in the Kelo case was to second guess the city's judgment that the project would indeed promote the city's economy. The procedure that the city had used was number of public hearings were held, economic studies, consultants… he felt that they had gone far beyond what they would need to do in establishing that the public purpose was real and legitimate.

Professor Whitman stated that it would be helpful to have statutory standards that the state and local government agencies have to follow when they take property that is to be turned over to private ownership. The standards would include procedures to be followed, such as requiring the agency to give a clear statement of the public benefits that are sought to be achieved, have public hearings so that public input can be made, findings of fact that the public benefits would indeed be achieved and an estimate of the value of the public benefits if those benefits are financial in nature. These standards would form the basis for judicial review so that if an agency went ahead with the taking without satisfying the standards their actions could be appealed to the courts and ultimately could be set aside.

Questions:

Q: Do you consider the Kelo decision to be a radical departure from previous Supreme Court decisions?
A: No, it is in a way a very incremental step, although it is a step in the sense that the previous decisions have all involved property that there was a problem with and here there is no problem with the property being taken.

Q: In the Missouri Constitution, Article 1, section 28 there is a statement about the review by the courts that says: "the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public". For some reason that section seems to have been overlooked or been interpreted in such a way that doesn't seem to have a lot of meaning in terms of the current review by the courts. Is there anything that you could enlighten us on the court interpretations of that section and how we got away from it or maybe we never got there?
A: I think it is fair to say when you read the Missouri Supreme Court and Court of Appeals' decisions in cases involving public use standard that they have been very willing to concede to the determinations of the agency that is doing the condemnation. They have not been at all eager to insert themselves into that equation and to slow down the local agency. It seems that it is highly proper for the court to have the final review power. I don't think that that provision of the constitution would be read to mean that there cannot be legislatively determined standards for agencies to follow.

Q: Assuming that the general assembly wants to deal with this issue, a question has arisen as to whether or not the general assembly has the complete power to deal with this issue of eminent domain. Is there anything in the constitution that needs to be amended

to take away those powers or is the power to changes in the hands of the general assembly?
A: To my knowledge, there is nothing in the constitution that would need to be changed in order to give the legislature a clear path to make statutory changes.
Q: I'm intrigued by your analysis of the Supreme Court cases and particularly the distinguishing feature that Justice O'Connor looked to and the prior cases against the Connecticut case and that was the use of the properties and their condition prior to the taking. It has also been pointed out to this task force that the Connecticut legislation at issue in that case differed somewhat from the legislation in Missouri that would permit a taking of this nature to the extent that a precondition to a take of that nature in Missouri would require a finding of blight or a conservation area in Connecticut that wasn't necessary. Do you think that being the case in Missouri, that if the Missouri standard had been applied in Kelo, would Justice O'Connor and other dissenters had been in the majority rather than the minority because of that finding?
A: If the Connecticut legislation had not permitted a taking purely for economic development purposes, then as a matter of Connecticut state law, not a matter of interpreting the fifth amendment of the constitution, the courts in Connecticut would have stricken down the intent to take. It is a complicated thing to do because we have legislation that deals with state agencies, with cities, with counties and with redevelopment agencies. I will take as truth, although I haven't checked it for myself, that absence of blight or conservation area, the eminent domain power simply would not be available to a redevelopment agency in this state.

Q: One of the purposes of this commission is to try to improve the process of eminent domain. You mentioned some statutory standards as suggestions; clear statement of benefit, public hearing, finding of facts and value benefit of the project. Do you have any insight or recommendations on what kind of a tool we could use to see if a project is beneficial? What I mean is if it creates two jobs or 250 jobs to the area, both are subjective. How can we implement that into the eminent domain process that municipalities and developers can look at it and see where that line is crossed to become a good project for the community?
A: I have to tell you that even though I have thought a good deal about it, I have despaired of finding an answer. It seems to me that ultimately you have to leave that decision in the first instance to the condemning agency and in the second instance to the courts to determine whether this is simply a bad faith possibility or whether it is supported by substantial evidence and is found in good faith in which I think the courts would have to uphold it.

Q: If you think eminent domain uses for economic development purposes is something that should be allowed and if we are not going to change the definition of blight, and that may be from what I've heard one of the few safeguards we have in Missouri to protect us from Kelo, then what else is there?
A: I don't think Kelo is a decision we need protecting from. If I had been on the court I would have voted with the majority. I don't think that the Connecticut legislation is out of order. If there is a legitimate established economic development objective, I don't find any difficulty in accepting that.

The next two presenters are Greg Smith, attorney with Husch & Eppenberger in St. Louis and Jim Koman, president of Koman Properties in St. Louis.

Greg has been an attorney for twenty five years and has acquired property over the course of the years and has condemned hundreds and hundreds of parcels and has tried cases to juries. He was the chairman of the Missouri Bar Eminent Domain committee for 4 years. He represents primarily developers in a variety of different contexts but he has also represented municipalities, most recently represented the city of St. Louis with regard to the development of the new Cardinal Ball Park. What he does most of is redevelopment for commercial and retail purposes. He will focus on case study in St. Louis County. St. Louis County is a county of 524 square miles with a population of just over a million people, which is about 1/5 of our state. There are 91 municipalities within St. Louis County. It is a mature county, in the last census it only grew by 1.6 percent, which is about 15,000 to 16,000 people over ten years. It is not an expanding county in terms of population but is a very stable county. He has done projects all over St. Louis County and feels it is a vital tool if St. Louis County and our urban counties are to survive. Eminent domain is an extremely inefficient way to buy ground. No one wants to use eminent domain as a way to get a better price for property and anyone who has ever condemned property will tell you that. From a different perspective, it is inefficient because it introduces the two greatest variables that are the death of commercial development. It creates uncertainty as to price and it creates uncertainty as to timing. The process of eminent domain in Missouri can take as long as a year or more to get a final valuation out of the jury and then you have the possibility of the appellate process. There are opportunities along the way to take title at a sooner time but that creates a significant risk as to price to be paid for the ground. The developer trying to bring a project into creation on a predictable time frame so he can meet demands is very challenging. It is inefficient and it is used rarely. In the course of his 25-year career, he only tried to a conclusion 12 or 13 condemnation cases. His rule of thumb is that 95% of the parcels in a development will be acquired by negotiation and 5% may have to be subjected to a threat or ultimately condemnation and of that 5% of those will ever get tried.

Mr. Smith then gave a power point presentation regarding a development project in the city of Brentwood. In the mid-90's the city of Brentwood changed its comprehensive planning and identifying the need as all municipalities must to continue to generate sales tax revenues to support its governmental functions, it knew that it only had a certain number of areas in the city within which it could redevelop the properties and continue to create the sales taxes which this state demands municipalities use to finance its municipal government. With this development they were able to attract to the community users that they could not attract with their existing type of commercial areas. They were able to bring in national retailers. They eliminated all the blighted conditions that were impeding the commercial center.

Mr. Smith realizes there are problems associated with the abuse of eminent domain and he doesn't think there will ever be a process where there won't be some abuse of it, but he has a different view of where the focus should be. He believes that historical use of

eminent domain has been critical for our country whether it is for railroads, mills, mining in the early formation of modern twentieth century government in urban areas. There are going to be individual property owners who property rights are going to have to give way for a greater public good, in this instance the elimination of blight and creation of economic revenue to run government. That person should be compensated fairly and he think we should minimize the inconvenience to that person. The focus should be that the property owner gets compensated well, that they are entitled to relocation benefits, they have predictability of timing in terms of how they are asked to vacate their property and the focus should be on that individual because they are definitely inconvenienced. If we did that he thinks we would continue to serve important functions of government and infrastructure and maybe address some of the outcry that exists today.

Q: You have 78 parcels; you are able to get 76 of those parcels in the fold so to speak without controversy. You have two hold-outs. That is one extreme. The other extreme is where you have 2 that one to do it and 76 who don't. The difficulty that we have is that all of the benefits that you were talking about are the same whether you have 76 in the fold or 2 in the fold with respect to that project with respect to the ultimate obsolescence or existing obsolescence of that shopping center. What is it that you do when you have two that say we want to do it and 76 don't or if you have half that say they want to do it and half that don't? I think those are the difficult situations, although the benefits are going to be the same regardless of whether you have the proponents or not. How do you deal with the situation where you have the 50-50's?
A: That is theoretically possible; however I have never been in that situation. There is too much uncertainty, there is too much time, there is too much process and no developer that I have ever worked with would go to that length.

Q: There are 91 municipalities in St. Louis County. Each of those municipalities by virtue of chapter 99 is empowered with the ability to approve a development plan and allow the use of eminent domain, right?
A: Yes.

Q: How do you deal with the tension of the municipalities who want to jump on the band wagon too and be competitive with the other municipalities and how do we control the legislative body, some of who may not have the level of sophistication as Brentwood or have the great city administrators who we find in places like Maplewood. How do we take care of that?
A: The perception is either you use eminent domain or the incentives. If those incentives are that the power of eminent domain for a redevelopment tool is what is creating the competition is to the contrary. What creates this competition is the fact that our form of government permits incorporation of municipalities and we then force those municipalities to finance their governments with sales tax. There are only two alternatives; real property taxes or sales tax. If you can't generate sales tax in a municipality, you are going to have to propose a real property tax on your citizens. The alternative is to create sales tax in your community. If you can eliminate all these incentives, you can eliminate the power of eminent domain and municipalities will still compete for my clients to come to their communities so that they can have the sales tax.

The only answer is to eliminate those municipalities. There would need to be a consolidation of municipalities and it has been discussed.

Q: What do you typically see as an average of a hold-out?
A: You will acquire 95% of the property by negotiation in most instances.

Q: Do you see low-balling offers and if so do we need to implement some sort of measure to prevent that?
A: No, in the project I am speaking of they were paid $30 a square foot. It doesn't make sense to low-ball because you are going to pay more in eminent domain through the volatility of the jury.

Q: Rather than have the developer handle the whole process, let the municipality handle the process. The developer would obviously have to fund it, but what are some of your comments on letting the municipalities handle the whole process and letting the developer fund it?
A: That is technically what is required and takes place on a technical legal basis in all contacts of redevelopment other than the use of chapter 353.

Q: It seems this project that you describe is very family to what is going on in Sunset Hills. What went right here and what is going wrong in Sunset Hills? How do we address the problems in Sunset Hills? It is much closer to middle ground as who is opposed and who is for the project. There are all indications that it is going to collapse under its own weight. Nonetheless, it seems there is an over-enthusiastic developer apparently and an overly gullible city government apparently and between those two they put a lot of people in a long-standing state of uncertainty about their property.
A: The political process has to work and I don't understand why in response to the level of political opposition that exists in Sunset Hills, I can't explain it. I can't explain why there wasn't prior to the initiation of any kind of eminent domain a more successful negotiation with property owners and probably more important why the community and the developer how they could figure out the economics for that project to succeed, given the lack of success in tying up those properties. I don't know how that project is going to succeed. If the project does not succeed, the reasons that we have placed most of the decisions with the local government is because they are subject to voters and I would venture to say that you will see a very significant backlash at the polls, which is where it should take place. I think the Texas law and the Alabama law could be modified and could be adopted by this state along with some additional procedural protection and more importantly some additional benefits for the property owner who is being inconvenienced.

Q: Are you capable of giving the committee some suggestions to the committee? We would like to hear specific changes you would suggest making.
A: I will be happy to do that.

Hopefully we all recognize as our constitution does, that reclamation and redevelopment of blighted areas is just as important to our urban areas as building roads across the rest of our state.

Q: In the case of Sunset Hills, the political pressure being what they were, if the financing had been solid to support the cost of going after the 25% of the parcels that did not want to settle, that would still be a project on the floor, right?
A: It is impossible. A financing commitment for a project like that will have 25 different conditions to funding. Those conditions would include assemblage of a certain percentage of the ground. The bank is going to insist on site control, tenant commitments which are contingent upon delivery of the site at a specific time and the bank will insist on validity to the assistance. It all boils down to the economics of the situation and good bankers are not going to take a risk.

Q: The officials are accountable to the voters. The municipality itself should be the only entity that has the power of eminent domain because they are the most responsible to the voters. In your experience in dealing with different governmental municipalities, what is your insight to removing or restricting power from private water districts, sewer districts, libraries, fire stations, etc.?
A: Those types of condemnors are very inactive. You can only build so many libraries, so many schools, so the instance of abuse is so diminished that is isn't an issue. There does need to be accountability.

Q: In listening to the Sunset Hills testimony it struck me that the property owners could not talk to the public officials. If the developer was doing things that were improper, there were not checks or balances. The proper relationship is that the city should control the developer and make sure the developer is responsible to the agreement. I'm curious about your reaction to some legislative requirement that the city retain control of that acquisition process.
A: Most of the redevelopment agreements that I am involved with today specifically obligate the developer to acquire the property by negotiative purchase and then before there will be any eminent domain initiated, the property owner brings the history of negotiations to the municipality and the municipality must then make its own offer before there is any initiation of eminent domain. Typically the developer cannot proceed in the name of the municipality until the municipality has forced him to try and do it independently and then if that has been unsuccessful, then the municipality will make a separate offer that has to be a good faith offer before there can be condemnation proceedings. There is a legislative process in chapter 353 stating that no corporation can receive eminent domain unless the municipal government has authorized eminent domain. It is a very dangerous thing to make policy because of the exception.

Q: Do you also do developments where you are not working with a municipality and condemnation is not an issue.
A: Absolutely.

Q: Could you please explain the process you go through there and then in turn explain to me the process where you are working in a redevelopment issue where condemnation is an option.
A: The process is very similar particularly since you always have zoning. There is a governmental process. First of all there is a tenant process. Then there is an acquisition process. You have to go through a zoning process. You have to get your permit, you have to get your financing, you have to get your contracts lined up, you have to make sure your contracts stay open and then of course there is ultimately a closing.

Q: When you are working through a redevelopment issue and you have acquired 75 or 80% of the property within the tract that you are looking for redevelopment and the other percentage of the landowners are unwilling to sell. At what stage of that have you already acquired your financing for the project so that the lender who is working with you knows what figure you are using for land acquisition or do you have to use the condemnation process before you get your final approval on your financing?
A: The difference in a situation where you have to use eminent domain or you don't is you are always going to have multiple parcels in the context of eminent domain. Typically what happens, when the area is identified and you go in and secure the parcels and the extent that there are remnant parcels that are necessary for development that are situated within it, then you have to approach those property owners and if they are unwilling to sell, you have to make a decision whether you can go forward with the project. In all of these instances where you don't have someone under contract so therefore you haven't quantified your land acquisition cost, you are going to make an assumption and suggest that to your lender. Most lenders will make a commitment to finance but there will be conditions to funding.

Steve Hobbs has had many comments to his office that people are disconcerted that we had public comment period and public testimony and now we have the "legal eagles" coming in at a special time where they can testify and he wanted to make it know to the task force. As far as the constitutional portion that was voted on in 1945, Senator Gross and Rep. Hobbs have been involved in a couple of changes to the constitution and things are different now than they were in 1945 and as long as the people have the opportunity to vote on the issue, they will make the right decisions, but I think what we have to remember is that we keep hearing talk about the rising tide floats all boats higher and that is a good saying. We just have to remember that everybody has to be in the boat and unfortunately in some of our urban areas, if you don't make enough money, if you are not in the right tax bracket, you are not wanted. There is a great amount of concern among people around the state. It is our job as a task force to find out what those answers are and to educate ourselves and the public on what is really happening.

Q: To the extent that you think the focus needs to be on compensation and the concept of just compensation. We know that the law in Missouri is that you cannot be compensated for lost profits in connection with the condemnation proceeding. Would it be your sense that compensation for lost profits should be part of the just compensation process?
A: I believe that in certain instances you can recover loss of profits. My point being that you have to demonstrate that there has been a taking of the business. If there is a

destruction of the business, you are entitled to recover for destroyed property. That maybe needs to be better articulated.

The next speaker was Jim Koman, president of Koman Properties a real estate development firm based in St. Louis County.

Jim has been a real estate developer for 22 years and is involved in a number of associations. He is a bi-state developer throughout the state and in Illinois. He wanted to give an idea of how tough it is to develop in the urban marketplace. One of his company's basic development policies is to try to bring retail back to the inner city. Koman Properties has been successful in developing in the city of East St. Louis. Some of the obstacles and challenges that they have had to overcome is that the reality of doing business in the inner city is much different than it is in other parts of the metropolitan areas. The lack of firm commitments from a lot of the big retailers for the inner city is a big problem. Financing is tough because most banks do not want to lend to inner city projects. They ask for more equity, higher personal guarantees, they have higher interest rate vs. suburban developments, they also have lower loan to value which makes you have to put in more equity to try to make this project a success. The use of TIF grants, added business taxes and subsidies incentives has been and will be an extremely important part of the inner city development process. Because of all the added costs, these development tools are critical to make these projects work. The inner city at this time is in decay and disrepair and that is true for a lot of areas in the urban core. There are a lot of dilapidated buildings that need to be removed. Eminent domain clearly provides for opportunity. I believe that if we have to rebuild our inner cities across America, we should start with rebuilding the base in these inner cities allowing people the opportunity to shop in their own neighborhoods. Without eminent domain blighted areas will remain blighted. It will remain undeveloped which will mean fewer services, less jobs and more poverty in the inner city.

Jim then did a power point presentation on a development project at the intersection of N. Grand Avenue, Page Avenue and Martin Luther King Boulevard.

Q: You mentioned that people want to live around areas that have retail and commercial development. Are you seeing that in this immediate area?
A: Yes, a Walgreen's is now going in and we did a housing study and it has almost tripled.

Q: Low-ball offers? When you go in do you offer more than the assessed value when you start it or have you seen low-ball offers?
A: We start high and we go higher because time is of the essence.

Q: Time limit? We have had several people testify that they have been hanging under the cloud of eminent domain for years. Do you have a number in mind or do you think you can only use eminent domain for an x number of years?

A: I do put sunset provisions in my development agreement. I believe everyone deserves a fair chance. If you can't get it done in three to five years, you shouldn't be in the business.

Q: We have looked at many ideas on how to address compensation and the procedural portion of use of eminent domain where we have a firm definition of public use. Are you in support of trying to bring more continuity to that process and have guidelines in place on how the process is going to work every time?
A: I think with the compensation I would be happy to say get two or three appraisals and then take some percentage of that and make an agreement so you can continue with the project.

Chairman Jarrett asked the panelists to feel free to share any subsequent ideas or suggestions they may have.

The next panelist was Stephen Anderson, Castle Coalition Coordinator, Institute for Justice in Washington, DC

History of Eminent Domain

- The power of eminent domain is awesome, so awesome that in the early days of this country, the US Supreme Court described it as "the despotic power". Quite simply, it is the power to remove residents from their long-time homes and destroy small family business. In order to protect property owners, the Fifth Amendment to the US Constitution provides "Nor shall private property be taken for public use, without just compensation."
- The drafters of the Missouri constitution went even farther in protecting property owners. The Missouri Bill of Rights, Article I, Section 28 provides that "private property shall not be taken for private use with or without compensation, unless by consent of the owner." And, to the extent a legislative body, typically a local council or commission, declares that a use is public and not private, Section 28 further provides that "the question whether the contemplated use by public shall be judicially determined without regard to any legislative declaration that the use is public.
- The true heart of the issue is public use. Historically, public use meant things actually owned and used by the public – roads, courthouses and post offices. The notion of public use has expanded to the point that the public use restriction is really no restriction at all. Property is routinely transferred from one person to another in order to build luxury condominiums and big-box stores. Abuse is happening in Missouri.

Missouri is one of the worst abusers of eminent domain in the nation.

Despite the protections uniquely provided by the Missouri constitution, this state's judiciary has abdicated its role, routinely affirming condemnations for private use. Missouri is the only state in the nation that allows a developer to condemn property.

The abuse of eminent domain was made possible by Missouri's current definition of blight. The most common way cities in Missouri make this change is to call it "blight removal". Urban renewal, as "blight removal" is often called was given ultimate approval in 1954 by the Supreme Court in Berman vs. Parker. Over the last 50 years, "blight removal" has come to mean everything but the common sense meaning of the phrase. What started as a way to remove dilapidated, vermin-infested properties has been perverted into the ability to take away perfect fine middle and working class neighborhoods like those in Sunset Hills, to give a private developer promising increased tax revenues and jobs. Statutes are vague and definitions of blight that literally that any property can be considered blighted are can be subject to be taken away.

The Supreme Court in Kelo completed the erosion of rights guarantees under the Fifth Amendment. As a result of this decision, every home, every church and every small business is now up for grabs to the highest bidder. Eminent domain remains a benefit for those with money and connections.

Suggestions:

- Independent legislation strictly prohibiting eminent domain to pure, historic public uses would be an important step. Eminent domain should only be used in those situations where the general public, public agencies or public utilities will ultimately use or own the property.
- Legislature can explicitly prohibit private to private transfers of property for economic development to increase tax revenue, tax base, employment or general economic health, when that activity does not result in (1) the transfer of land to public ownership (2) the transfer of land to a private entity that is a common carrier such as a railroad or utility, (3) the transfer of property to a private entity when eminent domain will remove a threat to public health or safety or (4) the lease of property to private entities that occupy an incidental area within a public project.
- Reform the way courts define public use by reaffirming the constitutional requirement that any determination of a public use by made by the courts.

Eminent domain abuse affects real people. Missouri has a historic opportunity to reverse years of exploitation and misuse of eminent domain power.

Reference Pennsylvania statute 17.12.1, which contains several good criteria for finding blight.
Mr. Anderson will provide additional information and recommendations on blight to the task force.

Next was a panel presentation from John Brencaglioni, Architect Firm from St. Louis; Steve Smith, President and Principal of Lawrence Group, St. Louis; and Marty Corcoran, City Administrator City of Maplewood

Steve Smith gave his experiences of eminent domain use. He fundamentally encourages re-development. As communities age, what can be done to revitalize these communities.

Redevelopment is more complex. Need to have comprehensive plan that gives confidence in future. Second, have ability to assembly land. Without eminent domain any individual can veto a project. Third, rights that are given to individuals. Eminent domain used properly will foster re-development and allow communities to revitalize.

Marty Corcoran stated that over the time the economy in Maplewood had declined and retailers had packed their bags and relocated to the regional malls. The community lost is economic base. Developer came along and proposed a development that would bring in major retailers and government supported but public did not. Proposed development did not occur and city continued to decline. Six new development projects have implemented, two have failed. The failed projects were because the public did not think they were needed. Sunset Hills is exception. In only two of the six projects did the city use eminent domain. In one of the projects 159 parcels were used and in only 5 of the parcels was eminent domain used. Most of the incentives were over the appraised value of the property. Developers in all cases did not try to low ball. The use of eminent domain is always a threat. Maplewood today is an up and coming place to live. Redevelopment was critical and eminent domain was a tool used. Law is not perfect but don't throw out baby with bath water.

John Brencaglioni stated that we need to understand how some of the projects come to pass and then offer up suggestions to get things under control. Not all situations are developer or municipality driven. Some projects are undertaken at the request of the neighborhoods or citizens of the community. Citizens found developer and then dumped project in city halls lap. City did not initiate project, the neighborhood did. Large majority of the neighborhoods must demonstrate that they want the development to occur. Recommendations from Sunset Hills scenario:

- City did everything right and reacted to citizens concerns
- Area did not quality for a blighted area. Suggest that the task force not mess with the definition of blight. Look at how Illinois defines blight in their TIF statutes.
- Look at establishing procedures for mediation issue – before eminent domain proceeding could be filed. Panel reviews the material before it goes to the actual court proceeding.
- Cities should know, and developers should disclose, all of the contingencies of financing.
- Definition of blight in Webster's dictionary "something that frustrates ones plans or withers ones hopes"

Senator Gross recognized John Brencaglioni's expertise on TIF issues and invited him to assist Sen. Griesheimer's committee on TIF reform.

In many instances developer goes in before an RFP has been initiated and don't inform the people of what their rights are. In many instances residents form waiver and then don't have any relocation benefits paid to them. Option contacts are not binding contracts – take a closer look at these.

Referendum in Maplewood – no referendum in Sunset Hills. Greater acceptance potentially. Should task force consider some form of referendum in terms of all the people within that municipality voting on the development.

Two of three panelists said this would not be a good idea. Maplewood used referendum and it worked well because of the size of the municipality. If the information people receive is not good, facts have to be delivered without embellishment, voting on emotional basis not rational basis. Size of municipality would be a concern. Cost may be issue.

Maplewood now has provisions where they are limiting eminent domain.

Jeffrey Kaczmarek said that ECD is a not-for-profit staff and provide staff to the Tax Increment Financial Commission, Land Clearance for Redevelopment Authority and the Port Authority.

Eminent domain provisions are used in a very conservative manner and have policies and procedures in place for the usage and are not used for taking of Greenfield sites/farmland for the most part. Eminent domain should be used as a tool of last resort. In Kansas City eminent domain is used mainly in the urban core area. Eminent domain is mainly used where there are multiple ownership interests and where clean titles are not available.

In Kansas City procedures are used. First developers are required to make a market rate offer to the landowner before requesting use of condemnation. Second, statutory authority makes a market rate offer (the value is determined by independent appraisals) to the landowner before filing for condemnation. Third, landowners are provided real estate services to find alternate sites. Work with them to show them different sights. Fourth, agencies are required to pay relocation expenses and fifth, if the offer is rejected condemnation is filed.

If eminent domain were not available as a tool, what is classified as the "rebirth" of Kansas City would not have occurred. Self interest vs. social good. Self interest impedes downtown revitalization. Definition of blight should be looked at very closely. Showed pictures of what was on site before the H&R Block started building. Submitted letter from Swope Community Builders, the only minority-led developer in the State of Missouri to be a designated TIF developer. Fact is that without the ability of local government to use eminent domain, critically needed new investments would not occur.

Lots of states are watching Missouri with regard to legislation on the subject of eminent domain.

Steve Taylor stated that eminent domain is a very difficult and complicated subject. Subject that is emotional because it deals with property rights but is a tool. Without the use of eminent domain as a tool redevelopments in down town areas would not be possible. Must be used sparingly and as a last resort.

PRELIMINARY CONSIDERATIONS

In evaluating the information received by the Task Force to date, some key considerations are emerging that can serve as the basis for additional work. These preliminary considerations include, but are not limited to, the following:

- Abuse of eminent domain has occurred in Missouri. Several things can be done to make the process fairer.
- Delegation of the authority to condemn property to private developers could be limited or strictly controlled by the governmental agency that approves a plan to acquire property.
- Property owners could be better informed of the eminent domain process by the condemning authority.
- When eminent domain is used for economic development, a different condemnation process could be used to ensure fairness. Such a process would have more public input and improved planning. For example, the developer could be required to submit a detailed and comprehensive development plan and homeowner impact statement that can be scrutinized by the public. Notice to the affected property owners could be made early in the process so that they have meaningful input into the plan before it is considered for approval by the governmental body. The governmental body could be required to monitor the project to ensure that the developer is following proper procedures. Redevelopment contracts between developers and the governmental bodies could be required by statute to contain certain provisions to provide protections to the landowners and public and require the developer to meet certain requirements before being allowed to condemn any property.
- There is no meaningful judicial review of the legislative determinations of public use or blight when eminent domain is used for economic development purposes. Providing an interlocutory appeal process to allow the courts to review the decision before the property is condemned could be helpful. In order to provide for meaningful review, consideration could be given to revising the standard of review by the court of the legislative determination of public use or blight.
- Consideration could be given for revising the guidelines for good faith negotiations between the condemning authority and the landowner. Mediation has proven successful in some cases and could be expanded to all types of eminent domain cases.
- Some sort of training, instructions, or qualifications for commissioners could be considered for uniformity and consistency across the state in determining just compensation.
- In situations where private developers are given authority to condemn, those private developers could be required to obtain approval from the governmental body before they can condemn any property.
- A more efficient and fair valuing process could be considered to ensure just compensation for landowners.

- Some form of penalty might be appropriate if a condemning authority is found guilty of "low-balling" on value.
- Time limitations or sunset provisions could be considered, similar to the 5-year takings limitation in the TIF statutes.
- A possible valuing formula could be that the fair market value of property that has been blighted shall be higher of the value on the date the property was blighted or the date of the taking.
- Relocation costs could be paid as part of the just compensation for the taking.
- The Task Force has heard testimony, but has not fully debated, what the appropriate definition for "public use" should be, and whether condemnation is appropriate for purely economic development purposes. The Task Force will further consider and address the issue in its final report.
- The Task Force has heard testimony, but has not fully debated, whether the definition of "blight" for eminent domain purposes should be revised, with consideration given to limiting a blight designation to property only with serious, objective problems, or whether the definition is fine as currently written. The Task Force will consider and address the issue in its final report.

The foregoing list is not intended to be final or all inclusive. As the Task Force continues to meet and study the issues, considerations may be added, refined, or deleted as circumstances determine.

WORK TO BE DONE

The Task Force has these and several other issues left to consider before it submits its final report by December 31, 2005. Additional information needs to be gathered and taken into account as we work towards developing final recommendations. Once the fact finding and information gathering phase is completed, the Task Force will develop action items and work toward developing its final recommendations

The Task Force is scheduled to meet through October, and more meetings may be necessary in order to complete its work and submit its final report by December 31, 2005.